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No. 93-965

In The

Supreme Court of the United States

January Term, 1994

RONALD A. LEVESQUE

Petitioner,

v.

KATHLEEN M. LEVESQUE

Respondent,

On Petition for Writ of Certiorari to

The New Hampshire Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

In 1980, the parties moved to Portsmouth, New Hampshire, where the Petitioner was stationed at Pease Air Force Base. They purchased a home off base, where the Respondent continues to reside today. By Libel dated October

23, 1984, the Respondent filed for divorce. The Petitioner was served in-hand in Portsmouth, New Hampshire on November 1, 1984. He filed a pro se appearance in the Rockingham County Superior Court on December 3, 1984. In 1985, the Petitioner accepted an over-seas assignment and moved to England. The Respondent remained in Portsmouth with the parties' children in the marital home.

Over the next few years, the parties spoke on occasion and discussed their divorce and decided that neither one of them would go forward with it. After a two-year period, the Superior Court dismissed the Libel for Divorce in accordance with Superior Court Rule 151, on March 11, 1987. The Petitioner then filed his Libel for Divorce dated May 7, 1991 on or about June 1, 1991, on the

grounds of irreconcilable differences. The Respondent filed her Answer and Cross Libel on July 2, 1991. No replication was filed by the Petitioner, and no request for relief pursuant to the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. Appendix §§ 501, et seq. (hereafter "SSCRA" or "Act") was made. A pretrial conference was requested by the Respondent and held on August 22, 1991. No request for relief under the SSCRA was made. On February 12, 1992, a hearing was held on the Respondent's Motion for Contempt following the Petitioner's failure to pay child support. No mention of the SSCRA was made. When the case did not settle the parties agreed to the scheduling of an additional pretrial conference in an effort to resolve it as quickly as possible.

The Petitioner then moved to amend his Libel to allege adultery. No mention of the SSCRA was made.

Following the hearing on the Petitioner's Motion to Amend his Libel, held on March 18, 1992, the Master denied the Petitioner's Motion to Amend. A second marital pretrial conference was also held on March 18, 1992. Both parties submitted proposed orders and a marital Pretrial Conference Order was issued. No mention was made of the SSCRA and no request for relief under the Act was made. Similarly, at the final hearing on the merits of the Petitioner's Libel for Divorce both parties submitted Proposed Orders and Requests for Findings of Fact and Rulings of Law. No mention of the SSCRA Act was made and no request for relief under the Act was filed.

Based on the testimony of the parties at trial, the Superior Court specifically found that the parties acquiesced in not pursuing their first divorce action and that both parties benefitted financially from their continued marital status. The Master noted that the parties' earlier divorce action had been dismissed without objection. (See Petition for Writ of Certiorari, p. 31; pp. 34-35; and p. 52).

Respondent respectfully draws this Court's attention to the Petitioner's Requests for Rulings of Law presented to the Superior Court (Petitioner's Writ of Certiorari, pp. 44-47.) As the Court can readily determine no request for relief under the Soldier's and Sailor's Civil Relief Act was made.

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED SINCE THE PETITIONER DID NOT REQUEST RELIEF AS PROVIDED IN THE ACT

The Petitioner concedes in his statement of the case that the provisions of the Soldiers' and Sailors' Relief Act were not raised in pleadings prior to trial, but he neglects to mention that the provisions of the Act were not raised during the trial or in any Request for Reconsideration filed upon the issuance of the Court's decision.

At no time did the Petitioner request relief in accordance with the Act. To the contrary, the parties' divorce was granted on the Petitioner's own Libel for Divorce, which was filed at the conclusion of his military service.

Various Sections of the Act provide the methods of requesting relief:

Section 521 provides that:

> "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

Again, the Petitioner made no request for relief under that Section of the Act, either during his period of military service or within sixty days thereafter. Instead, he opted to file a Libel for Divorce of his own. A year and a half later, following a long and intensely litigated divorce, unhappy

with the results of the Court's action, he raised the tolling provisions of the Act . . .

Section 520(4) relating to default judgments states clearly that

> (4)If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative not later than ninety days after the termination of such service be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act [50 USCS Appx. §§ 501 et seq.] shall not impair any right or title acquired by any bona fide purchaser for value under such judgment.

The Petitioner made no request to reopen or to vacate the dismissal of the first Libel for Divorce. Furthermore, 50 USCS §520(3) states that the provisions of §520 relate to actions or proceedings in which a person is a party "if such party does not personally appear therein or is not represented by an authorized attorney." In this case, the Petitioner had personally appeared.

When the Petitioner filed his appearance in the parties' first divorce action--thereby consenting to the jurisdiction of the Superior Court and its procedural rules--he was already in active military service. By filing his appearance the Petitioner voluntarily submitted to the jurisdiction of the Court. Cace v. Cace, 124 N.E.2d 856 (1955).

In Boone v. Lightner, 319 U.S. 561 (1943) this Court, while stating that the provisions of the Act should be liberally construed, also stated that discretion was vested in the lower courts to insure that the immunities provided under the Act were not put to unworthy use. Boone v. Lightner, 319 U.S. at 575.

It is undisputed that the Petitioner never requested relief under the Act, despite having been represented by three different attorneys during the course of his divorce litigation. The New Hampshire Supreme Court correctly found that no argument based on the Soldiers' and Sailors' Relief Act was made by the Petitioner in Superior Court. (Petition for Writ of Certiorari, p. 61).

SUPERIOR COURT RULE 151 IS A PROCEDURAL COURT RULE, NOT AN "ACTION OR PROCEEDING" TO WHICH 50 U.S.C. APP. §525 APPLIES

The Petitioner argues that Superior Court Rule 151 is, in effect, a statute of limitation. Despite that contention, there is no authority interpreting Superior Court Rule 151 as anything other than a procedural rule of the Superior Court. It does not set forth the requirements for "the bringing of any action or proceeding." It is instead a rule governing divorce actions that are already pending before the Superior Court. For this reason, 50 U.S.C. App. §525 does not apply with respect to the rule

A number of cases have held that 50 U.S.C. App. §525 does not apply to statutes and court rules governing

service of process or the continuation of the legal process in civil actions.

The case most on point is the appellate court decision of Zitomer v. Holdsworth, 449 F.2d 724 (3rd Cir. 1971). The appellate court in Zitomer upheld the dismissal of an action brought against a serviceperson for want of prosecution based on a court rule, just like the divorce action dismissed in this case based on Superior Court Rule 151. The court explicitly rejected the contention that the tolling provisions of 50 U.S.C. App. §525 applied to the dismissal of actions for want of prosecution. The court explained with respect to Section 525:

> "It simply tolls the statute of limitations during the period of military service and has no applicability to an action duly filed and served within the applicable statute of limitations."

Zitomer v. Holdsworth, 449 F.2d 724, 726 (3rd Cir. 1971). In Ricard v. Birch, 529 F.2d 214, 217 (4th Cir. 1976) the court followed the appellate decision in Zitomer stating that:

> "That case stands for the proposition that one whose suit is dismissed for failure to prosecute may not rely upon the Soldiers' and Sailors' Civil Relief Act to continue the action indefinitely."

Ricard v. Birch, 526 F.2d (1976) at 217 (citing Zitomer, 449 F.2d 724 (3rd Cir. 1971).

Similarly, in another case involving a Court rule which required dismissal for failure to prosecute, similar to Superior Court Rule 151, the court held that 50 U.S.C. App. §525 was not applicable to a rule which required that the parties "must act in order to protect the efficacy of the process and thus keep the action alive." Zarlinsky

v. Laudenslager, 167 A.2d 317, 318 (Pa. 1961). The Plaintiff in that case argued against the application of the court rule and attempted to rely on 50 U.S.C. App. §525. The court rejected this position stating:

> " ... this Section [Section 525] expressly applies to the limitation of time for bringing an action, not a limitation of time of the continuing of process in an action already brought, and avails the Plaintiff nothing."

Zarlinsky, 167 A.2d at 320 (emphasis in original).

In Thornley v. Superior Court of the City and County of San Francisco, 201 P.2d 567, 568 (Cal. App. 1949) the court held that 50 U.S.C. App. §525 did not suspend the time period for service of process as required under a state statute. In doing so the court explicitly rejected the military person's argument that the word "proceeding" in

Section 525 applied to the service of process or "any other procedural step taken in the prosecution of the action." Thornley 201 P.2d at 568. The court rejected this contention stating:

> The word 'proceeding' is used in its well known and accepted sense as designating a form of action somewhat different from the common action initiated by a complaint -- such as a proceeding in mandamus, prohibition or certiorari, or proceedings in probate, or those for special relief.

Id.

As explained in Thornley, the fact that Section 525 covers actions and "proceedings" was only meant to express that the law was intended to apply to not only typical civil actions before a court, but also to other forms of court proceedings such as those suggested in Thornley as well as other forms of proceedings by example in the statute itself: "any action or proceeding in

any court, board, bureau, commission, department, or other agency of government ...." 50 U.S.C. App. §525.

Conroy v. Aniskoff, ____ U.S. _____; (decided March 31, 1993) was decided just prior to oral argument in this case. In its decision, this Court upheld a literal interpretation of the Act, which expressly relates to the time period for the redemption of real property A literal interpretation of the statute as applied to the facts in the present case must result in the denial of the relief sought by the Petitioner.

The Petitioner also heavily relies on Buttler v. City of Los Angeles, 200 Cal. Rptr 372 (Cal. App. 2 Dist. 1984).

Unlike this case, Buttler involved an action brought by a serviceperson

before he had entered into military service. The court stated as the policy underlying its decision that "... to hold otherwise would discourage persons who have already filed lawsuits from enlisting in the armed services." Buttler, 200 Cal. Rptr. at 375. The circumstances of that case are diametrically different from this case in that the first divorce action in this case was filed by the Respondent, Mrs. Levesque, while the Petitioner, Mr. Levesque, was on active duty with the Air Force and stationed in the state in which the action was brought.

In addition, Buttler is distinguishable in that it did directly involve the preservation of the right to bring an action within the period of the statute of limitations, the stated purpose of 50 U.S.C. App. §525. In

Buttler, the court did not want to allow a dismissal for failure to prosecute because it might have adversely affected the serviceperson's ability to bring an action within the period of the statute of limitations. On that point, the court also relied upon Cahill v. Northeast Airlines, Inc., 344 N.Y.S.2d 372-73 (1974) in pointing out that a dismissal for failure to prosecute against the serviceperson would be an "idle gesture" in that the statute of limitations was tolled under 50 U.S.C. App. §525. However, what the Buttler court did not state with regard to Cahill was that Cahill did not hold that 50 U.S.C. App. §525 barred dismissals for want of prosecution against servicepersons. All that Cahill held was that, on the facts of the case before the court, such a dismissal would

have been an exercise in futility because 50 U.S.C. App. §525 tolled the statute of limitations so that the serviceperson could still have brought an action after the term of military service, regardless of whether the action had been dismissed for want of prosecution.

Unlike Buttler and Cahill, the statute of limitations is not at issue in this case. The dismissal of Mrs. Levesque's divorce action in no way affected Mr. Levesque's right to bring his own divorce action later. In fact, this appeal arises from the divorce action begun by Mr. Levesque just before his term of service with the Air Force ended.

In Chenausky v. Chenausky, 128 N.H. 116, 118 (1986) the New Hampshire Supreme Court held that a

serviceperson's appearance in the divorce action limited his or her right to claim a stay or tolling of any action under the SSCRA. The Court recognized that the purpose of the SSCRA was to make certain that the serviceperson had notice of the action and that a service-person could not invoke the protections of the SSCRA "unless he has failed to make any appearance at all in the proceedings that culminated in the entry of the default judgment." Chenausky, 128 N.H. at 118 (emphasis in original); see also Douglas, N.H. Practice, Family Law, §§26.05 and 26.06. See Roqueplot v. Roqueplot, 410 N.E.2d 441 (Ill. App. 1980) (recognizing that the service-person's filing of an appearance prevented a finding that military service had materially effected the service-person's representation in the case so

that he should not be allowed the protections of the SSCRA); Deacon v. Witham, 499 N.Y.S.2d 317, 319 (Cnty.Ct. 1985) holding that an appearance in the action constituted a waiver to claim the protections of the SSCRA); Reynolds v. Reynolds, 134 P.2d 251, 255 (Cal. Supreme Ct. 1943) (filing of special appearance to contest jurisdiction prevented serviceperson from claiming protection of SSCRA to stay or toll the action); see also Hackman v. Postel, 675 F.Supp. 1132 (N.D. Ill. 1988); Swartz v. Swartz, 412 So.2d 461 (Fla. App. 1982); Keefe v. Spangenberg, 533 F.Supp. 49 (W.D. Olk. 1981); Blankenship v. Blankenship, 82 So.2d 335 (Supreme Ct. Ala. 1955); Koser v. Koser, 27 N.W.2d 162 (Supreme Ct. Neb. 1947)(all holding that a serviceperson's filing of an appearance in the action prevented the

serviceperson from claiming the protections of the SSCRA).

THE PETITIONER HAS WAIVED ANY RIGHT TO CLAIM THE PROTECTIONS OF THE ACT.

> The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. The discretion that is vested in the trial courts to that end is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from service. Absence when one's rights or liabilities are being adjudged is usually prima facie prejudicial. But in some few cases absence may be a policy, instead of the result of military service, and discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use.

Boone v. Lightner, 319 U.S. 561, 575 (1943); see also Swartz v. Swartz, 412 So.2d 461 (Fla. App. 1982)(refusing to apply the protections of the SSCRA to a serviceperson finding that "any

disadvantage to him resulted from his own intentional and informed actions.").

In Roqueplot v. Roqueplot, 410 N.E.2d 441, 443 (1980) the court recognized that the serviceperson claiming relief under the SSCRA "was not diligent in presenting his petition for relief from judgment to the court since more than two-and-one-half years had elapsed before he filed it." In this case, the Plaintiff never filed such motion or made any other request for relief. The dismissal pursuant to Superior Court Rule 151 was entered on March 11, 1987. The Petitioner completed and returned from his service with the Air Force on June 1, 1991. He began the divorce action which is the subject of this appeal on May 7, 1991, in apparent recognition of the fact that the earlier case had been dismissed. The final

Decree was issued on September 24, 1992. During all of this time the Petitioner never raised the issue of what rights he might have had under the SSCRA. It was in the Petitioner's Notice of Appeal to the New Hampshire Supreme Court that, for the first time, the Petitioner raised the SSCRA. This conduct constitutes a waiver of the Petitioner's rights to claim any form of relief under the Act even if there were grounds for such relief in this case. See Johnson v. Burken, 930 F.2d at 1204 (recognizing that the SSCRA provides procedural rights and that, "[l]ike most procedural rights it can be waived."); Olsen v. Davidson, 350 P.2d 338, 340 (Supreme Ct. Colo. 1960)(recognizing waiver of any rights under Section 525 of the SSCRA); LaMar v. LaMar, 505 P.2d 566, 568-69 (Ariz. App. Ct 1973)(denying request by

serviceperson based on the SSCRA to vacate judgment against him because of evidence that he had known of action for a long period of time and was not prejudiced in defending against it).

Petitioner's request for relief from this Court focuses, erroneously, on the question of whether the tolling provisions of Section 525 of the Soldiers' and Sailors' Civil Relief Act apply to state court rules. It ignores the fact that (1) relief under the Act was not sought until the appeal of the case to the New Hampshire Supreme Court and (2) the decision of the New Hampshire Superior Court was based on the Petitioner's own Libel.

During the year and a half of litigation in the parties' divorce proceedings, the Petitioner had ample opportunity to request an order vacating

the dismissal of his spouse's earlier Libel for Divorce, or to request that the Superior Court decide the question of whether or not the tolling provisions of the Act applied to the earlier dismissal. He chose not to do so. It was only when the Petitioner was dissatisfied with the decision of the Superior Court that he raised the issue of the tolling provisions of the Act.

While the Act is designed to provide protection to members of the armed forces while on active duty, it should not be applied without limitation when the service member has waived its provisions.

CONCLUSION

Based on the foregoing, the decision of the New Hampshire Supreme Court should be upheld, and the Petition for Writ of Certiorari should be denied.

Dated: Portsmouth, New Hampshire

January 12, 1994

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Patti Blanchette, Attorney for Respondent and Counsel of Record, hereby certify that I have caused three (3) copies of the Respondent's Brief in Opposition to be served by U.S. Mail, postage prepaid upon Daniel A. Laufer, Esq., Counsel for Petitioner.

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